



DEPARTMENT OF JUSTICE

[Docket No. OLP 171]

Request for Information Regarding the Manner of Execution Regulations

AGENCY: Department of Justice.

ACTION: Request for Information.

SUMMARY: The Department of Justice is requesting information in the form of written comments that may include information, research, and data regarding 28 CFR part 26, which governs the implementation of federal executions. On November 27, 2020, the Department amended these regulations to expand the permissible methods of execution beyond lethal injection to “any other manner prescribed by the law of the State in which the sentence was imposed.” The amendments also authorized the use of state facilities and personnel in federal executions and made a number of procedural changes, including granting the Attorney General authority to make exceptions to the regulations and to delegate duties within the Department.

DATES: Electronic comments must be submitted, and written comments must be postmarked, on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket No. 171, through the Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.

- *Postal Mail or Commercial Delivery:* If you do not have internet access or electronic submission is not possible, you may mail written comments to Docket Clerk, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington DC, 20530. To ensure proper handling, please reference the agency name and Docket No. OLP 171 on your correspondence.

- *Please note that comments submitted by email or fax may not be reviewed by DOJ.*

Privacy Note: The Justice Department’s policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, (202) 514-8059 (this is not a toll-free number). If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), please call the toll free Federal Information Relay Service (FIRS) at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to comment on this notice by submitting written data, views, or arguments.

II. Background

On July 1, 2021, Attorney General Merrick Garland issued a moratorium on federal executions pending a review of certain policies and procedures. *See* Memorandum from the Attorney General, *Moratorium on Federal Executions Pending Review of Policies and Procedures* (July 1, 2021), <https://www.justice.gov/opa/page/file/1408636/download>. In issuing the moratorium, the Attorney General noted that “[t]he Department of Justice must ensure that everyone in the federal criminal justice system is not only afforded the rights guaranteed by the Constitution and laws of the United States, but is also treated fairly and humanely. That obligation has special force in capital cases. Serious concerns have been raised about the continued use of the death penalty across the country, including arbitrariness in its application, disparate impact on people of color, and the troubling number of exonerations in capital and other serious cases.” *Id.*

The Attorney General noted that, in the last two years preceding the issuance of the moratorium, the Department had made a series of changes to its policies and procedures

governing capital sentences, which were accompanied by the first federal executions in nearly two decades. *Id.* “To ensure that the Department’s policies and procedures are consistent with the principles articulated in [the] memorandum,” the Attorney General asked the Deputy Attorney General to supervise three reviews on this general subject.

The second of these reviews directs the Office of Legal Policy to consider whether and to what extent amendments made in November 2020 to federal regulations governing the manner of federal executions “should be modified or rescinded” and “to consider any other changes that should be made to the regulations.” *Id.* That review is the subject of this Request for Information.

A. Statutory and Regulatory Framework for Federal Executions

In 1993 (pursuant to 5 USC 301; 18 USC 4001(b), 4002; and 28 USC 509, 510), the Department of Justice issued regulations providing for lethal injection as the method of execution for federal capital crimes “except to the extent a court orders otherwise,” 28 CFR 26.3, and governing various tasks related to scheduling and carrying out the federal death sentences, 58 Fed. Reg. 4898 (Jan. 19, 1993); 28 CFR Part 26 (effective through Dec. 27, 2020). Among other things, the regulations provided that, except as otherwise ordered by a court, a federal sentence of death shall be executed “[o]n a date and at a time designated by the Director of the Federal Bureau of Prisons,” “[a]t a federal penal or correctional institution designated by the Director of the Federal Bureau of Prisons,” and “[b]y a United States Marshal designated by the Director of the United States Marshals Service.” 28 CFR 26.3(a)(1)-(3) (effective through Dec. 27, 2020).

A year later, Congress enacted the Federal Death Penalty Act (“FDPA”), Pub. L. No. 103-322, § 60002, 108 Stat. 1796, 1959 (1994), which provides that a federal death sentence shall be carried out “in the manner prescribed by the law of the State in which the sentence is imposed.” 18 U.S.C. 3596(a). If the law of the state in which the sentence is imposed “does not provide for implementation of a sentence of death,” then the FDPA instructs that “the court shall

designate another state, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented . . . in the manner prescribed by such law.” *Id.*

B. November 2020 Amendments to the Manner of Execution Regulations

On November 27, 2020, the Department of Justice amended the regulations governing the manner of federal executions “to provide the Federal Government with greater flexibility to conduct executions in any manner authorized by” the FDPA. 85 FR 75846, 75847 (Nov. 27, 2020). The amendments, which became effective on December 28, 2020, made a number of changes, detailed below.

Before the amendments were promulgated, the Department published a notice of proposed rulemaking (“NPRM”) on August 5, 2020. *See* Manner of Federal Executions, 85 FR 47324 (Aug. 5, 2020). By the end of the 30-day comment period on September 4, 2020, the Department had received 23 comments that were responsive to the proposed rule. These comments were addressed in the final rule, published in the Federal Register on November 27, 2020. 85 FR 75846-75853.

1. Manner of Execution Amendments

The Department of Justice amended 28 CFR 26.3(a)(4) to provide that federal executions are to be carried out by lethal injection “or by any other manner prescribed by the law of the State in which the sentence was imposed or which has been designated by a court in accordance with 18 U.S.C. 3596(a).” In making this change, the Department noted that it “would ensure that the Department would be authorized to use the widest range of manners of execution permitted by law.” 85 FR at 75848.

The Department also amended section 26.4(a) so that the notice of the date of execution provided to a prisoner also stated the method of execution to be used. The amendments also added a new sentence at the end of the paragraph to read as follows: “If applicable law provides that the prisoner may choose among multiple manners of execution, the Director or his designee shall notify the prisoner of that option.” 28 CFR 26.4(a).

2. Use of State Facilities Amendments

The November 2020 amendments authorized the use of state facilities and personnel in federal executions by striking “federal” before “penal or correctional institution” in section 26.3(a)(2) and by replacing “[b]y” with “[u]nder the supervision of” a United States Marshal in section 26.3(a)(3).

3. Section 26.1

The amendments added a new provision, section 26.1(b), that authorized the Attorney General to vary from the regulations to the extent necessary to comply with applicable law. The provision reads: “Where applicable law conflicts with any provision of this part, the Attorney General may vary from that provision to the extent necessary to comply with the applicable law.” 28 CFR 26.1(b).

The November 2020 amendments also added a new provision, section 26.1(c), that stated that any task or duty assigned to any officer or employee of the Department of Justice under Part 26 may be delegated by the Attorney General to any other officer or employee of the Department of Justice.

4. Section 26.2

The amendments removed section 26.2, which had required prosecutors to submit a proposed Judgment and Order to the court in cases in which the defendant was sentenced to death. The content of the Judgment and Order had included four basic points: (1) The sentence was to be executed by a United States Marshal, (2) by injection of a lethal substance, (3) on a date and at a place designated by BOP, and (4) the prisoner under sentence of death was to be committed to the custody of the Attorney General or his designee for detention pending execution of the sentence.

5. Section 26.3

In section 26.3(a)(3), the November 2020 amendments clarified that “qualified” personnel must carry out an execution, regardless of manner.

The amendments to section 26.3(a)(3) also provided that the sentence of death be executed under the supervision of a United States Marshal designated by the Director of the United States Marshals Service, assisted by additional qualified personnel who are selected by the Director of the United States Marshals Service and the Director of the Federal Bureau of Prisons, or their designees, and acting at the direction of the Marshal.

6. Section 26.4

Section 26.4(a) provides that a prisoner will receive notice of the date designated for execution “at least 20 days in advance, except when the date follows a postponement of fewer than 20 days of a previously scheduled and noticed date of execution, in which case” the prisoner shall be notified “as soon as possible.” The November 2020 amendments placed responsibility for such notification with the “Director of the Federal Bureau of Prisons or his designee” instead of with the “Warden.”

Section 26.4(b) governs prisoner access to other persons in the week before the designated execution date, limiting such access to spiritual advisers, defense attorneys, family members, institution officials, and — upon the approval of the BOP Director or his designee — “such other proper persons as the prisoner may request.” The amendments clarified that the BOP Director or his designee may approve prisoner requests for types of visitors not listed in the regulation, eliminating a reference to the “Warden.”

Section 26.4(c) governs execution attendance, requiring certain official personnel to attend and imposing limits on the numbers and types of other persons whom the prisoner and officials may designate to attend. The amendments eliminated references to the “Warden,” thus eliminating the requirement that the Warden attend executions, while maintaining the requirement that the Marshal attend. The only other proposed change was to vest authority for selecting necessary personnel in the Marshal and the BOP Director or his designee, instead of in the Marshal and the Warden.

7. Section 26.5

The amendments to section 26.5 extended to non-Department of Justice employees (including contractors) existing protections that applied to Department of Justice employees, allowing them not to be in attendance at or to participate in any execution if such attendance or participation is contrary to the moral or religious convictions of the Department of Justice employee.

C. 2021 Moratorium on Federal Executions Pending Review of Policies and Procedures

As noted above, Attorney General Garland issued a moratorium on federal execution during the pendency of three reviews. The second, and the subject of this Request for Information, is a review “to consider whether and to what extent [the November 2020] amendments should be modified or rescinded” and “to consider any other changes that should be made to the regulations.” See Memorandum from the Attorney General, *Moratorium on Federal Executions Pending Review of Policies and Procedures* (July 1, 2021), <https://www.justice.gov/opa/page/file/1408636/download>.

III. Solicitation of Comments

The Department of Justice requests information from individuals or organizations regarding whether the November 2020 amendments should be modified or rescinded and whether any other changes should be made to the regulations in 28 CFR part 26. To contribute effectively to this review, all commenters are encouraged to provide comments that are responsive specifically to the topics of this review.

The Department is particularly interested in responses to the questions below, although the Department would welcome any comment within the scope of this inquiry.

Manner of Execution

1. If a State authorizes two or more manners of execution (e.g., lethal injection and firing squad), what limitations or restrictions, if any, should be placed on the federal government’s ability or authority to choose which of those manners of execution it would employ for federal executions, both in contexts where the State provides the inmate a choice among methods as well

as in contexts where the State does not have a choice provision but authorizes two or more permissible manners?

2. If the manner of execution prescribed by the law of the State in which the sentence is imposed was unconstitutional for violation of the 8th Amendment's "cruel and unusual punishment" clause, how should the federal government implement the death sentence?

3. What obligation, if any, would the federal government have to independently analyze and assess the constitutional validity of state-law manners of execution before employing one?

4. If an inmate's medical conditions made it likely that use of a State's manner of execution would subject the inmate to unconstitutional pain and suffering, should the federal government be permitted to use an alternative form of execution? Who would determine and how would they determine that the inmate's medical conditions made it likely that use of a State's manner of execution would subject the inmate to unconstitutional pain and suffering?

5. Currently, the federal government only has the equipment and personnel to conduct executions by lethal injection. What logistical, practical, or legal steps would the federal government need to take to implement a State method of execution other than lethal injection?

Use of State Facilities

6. Are there logistical or practical concerns with allowing the federal government to make arrangements or agreements with the relevant State to use State equipment, facilities, and personnel for federal executions? Please explain.

Notice

7. When regulations, guidance, or policy regarding implementation of the death sentence is changed, what process should the federal government follow to ensure appropriate notice?

8. Should inmates and/or inmate's counsel be notified of any potential deviations from the regulations? If so, how and by whom?

9. What limitations or modifications should be made, if any, to the Attorney General's authority in 28 CFR 26.1(b) to vary from the regulations "to the extent necessary to comply with the applicable law"?

10. Should the notice requirement in 28 CFR 26.4 include notice to counsel? If so, how and by whom?

11. Are the time periods for notice provided in the regulations sufficient, for example, to permit the filing of a clemency petition or to request a stay of execution? If not, how much time should be allotted for notice and why?

Delegation of Duties

12. When duties are reassigned between Department of Justice components, what types of processes or protocols should be implemented to ensure transparency, effective implementation of the law, and consistency?

Judgment and Order Filings

13. What was the practical function that a Judgment and Order filing had in litigation?

Definitions

14. Are there any undefined terms in the regulations or statute that would benefit from a definition? If yes, please explain why the term should be defined and what the definition should be. In particular, please consider whether the following terms should be defined and, if so, what the definitions should be:

- "When a stay is lifted"
- "Promptly"
- "Qualified"

Visitors and Witnesses

15. What criteria should be applied regarding access to visitors in the week before the designated execution date?

16. What criteria should be applied to the selection of witnesses who are present during federal executions?

17. To what extent should the federal government limit the number of — or otherwise participate in the selection of — spiritual advisers, attorneys, friends, or relatives who may access a prisoner prior to a designated date of execution?

Generally

18. Are there particular provisions of the November 2020 amendments or the prior regulatory scheme that should be retained, modified, or rescinded and, if so, why?

19. Should any other changes be made to 28 CFR Ch. I, Pt. 26, Subpart A?

Dated: September 21, 2022.

Hampton Y. Dellinger,
Assistant Attorney General,
Office of Legal Policy.

[FR Doc. 2022-20889 Filed: 9/26/2022 8:45 am; Publication Date: 9/27/2022]